

1 JIVAKA CANDAPPA, (SBN 225919)
2 46 Shattuck Square, # 15
3 Berkeley, CA 94704
4 Telephone: (510) 981-1808
5 Facsimile: (510) 981-1817

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7 Attorney for Plaintiff, KEVIN WALKER

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KEVIN WALKER,

Plaintiff

vs.

CITY OF HAYWARD; OFFICER ART THOMS, OFFICER SCOTT LUNGER, and OFFICER ZACHARY HOYER, individually and in their official capacities; AMERICAN DISCOUNT SECURITY; and DAUD WARDAK aka DAVID WARDAK,

Defendants.

Case Number: C 07-06205 TEH

**PLAINTIFF KEVIN WALKER'S
OPPOSITION TO DEFENDANTS
AMERICAN DISCOUNT SECURITY
AND DAUD WARDAK'S MOTION TO
DISMISS PLAINTIFF'S FIRST
AMENDED COMPLAINT**

DATE: June 9, 2008

TIME: 10:00 a.m.

CTRM: 12

JUDGE: Hon. Thelton E. Henderson

I. INTRODUCTION

2 On December 9, 2005, Plaintiff Kevin Walker and his friend, Jerry Walker, both
3 African-American males, were standing outside a Jack in Box restaurant in the City of Hayward
4 when they were detained, assaulted and arrested without lawful justification by officers of the
5 Hayward Police Department consequent to a false and malicious report made by Defendant
6 Daud Wardak (“Wardak”), an employee of Defendant American Discount Security (“ADS”).
7 Defendants Wardak and ADS now bring this motion to dismiss accusing Plaintiff of filing a
8 sham pleading and arguing that his lawsuit has no merit because it is based on a one time
9 encounter that Plaintiff had with Defendant Wardak. (Defs’ P&A iso Mot. to Dismiss, at 4:15-
10 19.)

11 Contrary to Defendants' contentions, the factual allegations in Plaintiff's complaint
12 support each cause of action asserted against Defendants Wardak and ADS. In short,
13 Defendants' motion to dismiss is without merit and Plaintiff respectfully requests the Court to
14 deny Defendants' motion.

II. ARGUMENT

16 “The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely
17 granted.” *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997); *Rodriguez v.*
18 *California Highway Patrol*, 89 F. Supp. 2d 1131, 1143 (N.D. Cal. 2000). In ruling on a Rule
19 12(b)(6) motion, the court must consider the complaint in the light most favorable to the
20 plaintiff, accept all well-pleaded factual allegations, and determine whether the plaintiff can
21 prove any set of facts to support a claim that would merit relief. *Cahill v. Liberty Mutual*
22 *Insurance Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). Further, not only must all factual
23 allegations be taken as true, but “all reasonable inferences from them must be indulged in favor
24 of the complainant.” *Mitchell v. King*, 537 F.2d 385, 386 (10th Cir. 1976). The issue is not
25 whether plaintiff will prevail, but whether plaintiff is entitled to offer evidence to support the
26 claims. *Hydrick v. Hunter*, 500 F.3d 978, 985 (9th Cir. 2007). Thus, a “suit should not be
27 dismissed if it is possible to hypothesize facts, consistent with the complaint that would make
28 out a claim.” *Hearn v. R.J. Reynolds Tobacco Co.*, 279 F. Supp. 2d 1096, 1101 (D. Ariz.

1 2003).

2 Here, the Court should deny Defendants' motion to dismiss because the factual
 3 allegations in Plaintiff's complaint state a claim for relief for violations of 42 U.S.C. section
 4 1983 and Civil Code sections 51.7 and 52.1, and negligence, negligence per se and intentional
 5 infliction of emotional distress.

6 **A. Plaintiff's Causes of Action for Violations of 42 U.S.C. § 1983 should not be
 7 Dismissed because Defendants Acted Jointly with the Hayward Police Department.**

8 Defendants' motion to dismiss Plaintiff's causes of action pursuant to 42 U.S.C. section
 9 1983 is based on the argument that Defendants' conduct could not be fairly attributable to the
 10 state.¹ (Defs' P&A iso Mot. to Dismiss, at 6-7.) Defendants further contend that Plaintiff's
 11 First Amended Complaint does not allege a substantial degree of cooperative action between
 12 the public and private entity defendants, that the allegations of conspiracy are merely
 13 conclusory, and that the alleged misfeasance by defendants is solely attributable to the conduct
 14 of the public entity defendants, the City of Hayward and its employees. (Defs' P&A iso Mot.
 15 to Dismiss, at 6-7.)

16 "A party may be a state actor because he is a state official, he acted together with or has
 17 obtained significant aid from state officials, or his conduct is otherwise chargeable to the State."
 18 *Lugar v. Edmundson Oil, Co.*, 457 U.S. 922, 936 (1982). A private person is deemed to act
 19 under color of state law if she or he is a willful participant in the joint action with the state or
 20 conspires with state actors to violate a citizen's constitutional rights. *Dennis v. Sparks*, 449
 21 U.S. 24, 27-28 (1980). Thus, willful participation and conspiracy constitute separate bases for
 22 finding joint action under color of state law. *See, e.g., Brunette v. Humane Society of Ventura*
 23 *County*, 294 F.3d 1205, 1211 (9th Cir. 2002) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144,
 24 150-52 (1970)). Additional bases for finding joint action include failure of the police to
 25 conduct an independent investigation, and police action pursuant to a customary plan between
 26

27
 28 ¹ Defendants, for purposes of this motion, do not dispute that Plaintiff has alleged the violation
 of a constitutional right.

1 the private actor and the police.² *Murray v. Wal-Mart, Inc.*, 874 F.2d 555, 559 (8th Cir. 1989).

2 Section 1983 liability may be based on a defendant's own affirmative act, participation
 3 in another's affirmative acts, or failure to perform an act which the defendant is by law required
 4 to perform. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). Consequently, personal
 5 participation is not the only basis for section 1983 liability. *Id.* "The requisite causal
 6 connection can be established not only by some kind of direct personal participation in the
 7 deprivation, but also by setting in motion a series of acts by others which the actor knows or
 8 reasonably should know would cause others to inflict the constitutional injury." *Id.* at 743-44.

9 Here, contrary to Defendants' contention, Plaintiff is not required to plead his claim
 10 with particularity. *See Murray*, 874 F.2d at 558, *McKeever v. Block*, 932 F.2d 795, 798 (9th
 11 Cir. 1991). Nonetheless, Plaintiff has alleged that Defendants engaged in joint action with
 12 officers of the Hayward Police Department. (First Amended Complaint ("FAC") ¶¶ 14, 36.)
 13 The joint action alleged includes willful participation, conspiracy, failure to conduct an
 14 independent investigation, and police action pursuant to a customary plan between Defendants
 15 and the Hayward Police Department. (FAC ¶¶ 20-31.)

16 The line of cases relied on by Defendants, including *Collins v. Womancare*, 878 F.2d
 17 1145 (9th Cir. 1989), and *Carey v. Continental Airlines*, 823 F.2d 1402 (10th Cir. 1987), are
 18 distinguishable. First, *Collins* did not address the factual scenario involving conspiracy, or
 19 police action pursuant to a customary plan between the police department and the private actor.
 20 Second, in *Collins*, the police conducted an independent investigation whereas, here, the police
 21 did not. 878 F.2d at 1155. *Carey* is similarly distinguishable because, there, the police
 22 conducted an independent investigation, maintained a policy of neutrality and arrested plaintiff
 23 only after he refused to leave the premises. 823 F.2d at 1403-04. On the other hand, here, the
 24 police did not conduct an independent investigation, did not maintain a policy of neutrality and

26 ² Allegations that "each and all the acts" set forth in the "complaint 'were done by the
 27 Defendants under the color and pretense of state law'" and a statement of damages identifying
 28 the injuries that were proximately caused by defendants in violation of plaintiff's constitutional
 rights is more than adequate to allege a section 1983 claim against a private actor. *Murray v.
 Wal-Mart, Inc.*, 874 F.2d 555, 558 (8th Cir. 1989).

1 did not ask Plaintiff to leave the premises before apprehending him. (FAC ¶ 22.)

2 **1. Defendants were Willful Participants in the Police Action against Plaintiff.**

3 Plaintiff's First Amended Complaint alleges that Defendant Wardak summoned the
 4 police by making a false report that three or four black males were causing a disturbance in the
 5 parking lot of Jack in the Box. (FAC ¶ 20.) When officers of the Hayward Police Department
 6 arrived on the scene, Defendant Wardak directed the officers to arrest Plaintiff and Jerry
 7 Walker for trespassing. (FAC ¶ 22.) The officers arrested Plaintiff and Jerry Walker, without
 8 conducting an independent investigation. (FAC ¶¶ 22-24.) In the course of arresting Plaintiff,
 9 the officers knocked Plaintiff to the ground, punched him in the face and pepper sprayed him in
 10 his eyes. (FAC ¶ 23.)

11 Defendant Wardak's conduct went beyond that of a mere complainant or bystander. He
 12 was a willful participant in the police action at issue. Defendant Wardak not only made a
 13 citizen's arrest, he signed a materially false citizen's arrest report that was authored by Officer
 14 Snell of the Hayward Police Department. (FAC ¶¶ 26-27.) In his written citizen's arrest
 15 statement, Defendant Wardak falsely accused Plaintiff of trespassing and engaging in criminal
 16 conduct. (FAC ¶ 27.) Defendant Wardak also testified as a prosecution witness in the criminal
 17 case against Plaintiff. (FAC ¶¶ 26, 29.) The fact that Defendant Wardak did not advise the
 18 police how to make the arrest or that he did not tell the police to beat Plaintiff without
 19 provocation is irrelevant because Defendant Wardak set in motion a series of acts, which he
 20 knew or should have known would result in a violation of Plaintiff's constitutional rights by
 21 officers of the Hayward Police Department. *See Johnson*, 588 F.2d at 743-44.

22 **2. Defendant Wardak Conspired to Violate Plaintiff's Constitutional Rights.**

23 Defendant Wardak engaged in joint action with officers of the Hayward Police
 24 Department by conspiring to violate Plaintiff's constitutional rights. *See Dennis*, 449 U.S. at
 25 27-28. An agreement or meeting of the minds between the private person and the state actor to
 26 violate a plaintiff's constitutional rights would suffice to establish the allegation of a
 27 conspiracy. *United Steelworkers of America v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540-41
 28 (9th Cir. 1989). Further, "[e]vidence that police failed to exercise independent judgment will

1 support an inference of conspiracy with a private party.” *Id.* at 1541.

2 Here, the police officers did not exercise independent judgment in apprehending
 3 Plaintiff and merely complied with Defendant Wardak’s request to arrest Plaintiff. (FAC ¶ 22.)
 4 The officers did not ask Plaintiff or Jerry Walker why they were in the area or even ask them to
 5 leave. (FAC ¶ 22.) After Plaintiff was assaulted and arrested, the police officers and Defendant
 6 Wardak falsely averred that Plaintiff was engaged in criminal conduct. (FAC ¶¶ 26-27.)
 7 Further, Defendant Wardak collaborated with the police officers in that Wardak’s citizen arrest
 8 report was authored by Officer Snell of the Hayward Police Department, Wardak was identified
 9 as a witness in the relevant police reports, and Wardak testified as a prosecution witness at
 10 Plaintiff’s criminal trial. (FAC ¶ 26, 27, 31.)

11 Under the circumstances, Plaintiff has established that Defendants Wardak and ADS
 12 acted under color of state law.

13 **3. The Police Officers Failed to Conduct an Independent Investigation and
 14 Acted Pursuant to a Customary Plan Between the Hayward Police
 15 Department and ADS.**

16 The Hayward Police Department officers’ failure to conduct an independent
 17 investigation further supports Plaintiff’s allegation that Defendants ADS and Wardak acted
 18 under color of state law. *See Murray*, 874 F.2d at 558-59; FAC ¶ 22. The joint action
 19 requirement has also been met in light of the allegation that Plaintiff’s arrest was pursuant to a
 20 customary plan between the Hayward Police Department and Defendant ADS. FAC ¶ 28;
Murray, 874 F.2d at 558-59.

21 The Court should therefore deny Defendants’ motion to dismiss Plaintiff’s first and
 22 third causes of action-violation of Plaintiff’s constitutional rights pursuant to 42 U.S.C. section
 23 1983.

24 **B. The Negligence Per Se Cause of Action is Based on Defendants’ Violation of Civil
 25 Code § 43.**

26 Defendants ADS and Wardak move for dismissal of the negligence per se cause of
 27 action on the grounds that Plaintiff’s injuries (as opposed to arrest) were proximately caused by
 28 the Hayward Police Department officers, and the criminal charges brought against Plaintiff

1 were not initiated by Defendants Wardak or ADS. (Defs P&A iso Mot. to Dismiss, at 8:9-17.)

2 “Under the doctrine of negligence per se, codified in Evidence Code section 669,
 3 violation of a statute without justification constitutes presumptive failure to exercise due care
 4 only if the violation proximately caused the injury and the person injured was one of the class
 5 of persons for whose benefit the statute was adopted.” *Fredette v. City of Long Beach*, 187
 6 Cal.App.3d 122, 134 (1986) (citing *Hargrave v. Winquist*, 134 Cal. App. 3d 916, 925 (1982)).
 7 “Whether the injury involved resulted from an occurrence of the nature which the statute was
 8 designed to prevent and whether the plaintiff was one of the persons for whose protection the
 9 statute was enacted are questions of law.” *Fredette*, 187 Cal.App.3d at 135. However, whether
 10 defendant violated the statute at issue or whether the statutory violation by defendant
 11 proximately caused or contributed to plaintiff’s injury would be a matter of fact for the jury to
 12 decide. *Id.*

13 Here, Plaintiff’s negligence per se cause of action is based on Defendants’ violation of
 14 section 43 of the California Civil Code, which provides in pertinent part that every person has
 15 the right of protection from bodily restraint or harm. (FAC ¶¶ 55-58.) In this regard, the
 16 California Supreme Court has stated that a private actor may be sued on the basis of a section
 17 43 violation. *Jones v. Kmart Corp.*, 17 Cal.4th 329, 338 (1998) (case involving wrongful
 18 arrest). And, given that Plaintiff’s negligence per se cause of action is based on his unlawful
 19 arrest by Defendant Wardak, an employee of ADS, Plaintiff has stated a negligence per se
 20 cause of action against Defendants Wardak and ADS. (FAC ¶¶ 22-23, 55-58.)

21 Defendants’ argument that Plaintiff’s injuries were caused by officers of the Hayward
 22 Police Department is irrelevant. First, proximate causation is a matter of fact to be decided by
 23 the jury, and as such, it ought not to be resolved as a matter of law in connection with a motion
 24 to dismiss. *See Fredette*, 187 Cal.App.3d at 135. Second, section 43 of the Civil Code
 25 prohibits unlawful bodily restraint, *e.g.*, arrest, and Defendants do not dispute that Plaintiff was
 26 arrested by Defendant Wardak. (Defs’ P&A iso Mot. to Dismiss, at 6:22-23, FAC ¶¶ 22-23.)
 27 Therefore, the Court does not have to resolve the factual dispute as to whether or not
 28 Defendants’ conduct was a substantial factor in Plaintiff’s beating and assault (bodily harm) at

1 the hands of the Hayward Police Department officers.

2 Accordingly, the Court should deny Defendants' motion to dismiss.

3 **C. The Negligence of Defendants WARDAK and ADS Caused Plaintiff's Injuries.**

4 The elements of a negligence cause of action are legal duty to use due care, breach of
 5 that duty, causal connection between the breach and the plaintiff's injury, and actual loss or
 6 damage to the plaintiff. *Burgess v. Sup. Ct.*, 2 Cal.4th 1064, 1072 (1992); *Ahern v. Dillenback*,
 7 1 Cal.App.4th 36, 42 (1991). "It is well established, moreover, that one's general duty to
 8 exercise due care includes the duty not to place another person in a situation in which the other
 9 person is exposed to an unreasonable risk of harm through the reasonably foreseeable conduct
 10 (including the reasonably foreseeable negligent conduct) of a third person." *Lugtu v. California*
 11 *Highway Patrol*, 26 Cal.4th 703, 714 (2001) (citing *Schwartz v. Helms Bakery Limited*, 67
 12 Cal.2d 232, 240-244 (1967); *Richardson v. Ham*, 44 Cal.2d 772, 777 (1955); Rest.2d Torts, §§
 13 302, 302A)

14 Here, Defendant Wardak exposed Plaintiff to an unreasonable risk of harm by making a
 15 false police report and advising the police officers to arrest Plaintiff for trespassing. Defendant
 16 Wardak knew or should have known that by making a false police report about a disturbance
 17 and requesting the police to arrest Plaintiff (without lawful justification) that the police officers
 18 executing the citizen's arrest would use force to apprehend Plaintiff. The fact that the officers
 19 used excessive force to make the arrest does not constitute a legal excuse such that it would
 20 foreclose the liability of Defendants Wardak and ADS as a matter of law.

21 The Court should deny Defendants' motion to dismiss the negligence cause of action.

22 **D. The Court should not Dismiss the Intentional Infliction of Emotional Distress
 23 Cause of Action because Defendants' Conduct was Intentional and Outrageous.**

24 Defendants argue that Plaintiff failed to allege facts showing outrageous conduct.

25 (Defs' P&A is Mot. to Dismiss, at 9:25-28, 10:1-4.) The elements of a claim for intentional
 26 infliction of emotional distress are: "(1) extreme and outrageous conduct by the defendant with
 27 the intention of causing, or reckless disregard of the probability of causing, emotional distress;
 28 (2) the plaintiff's suffering severe or extreme emotional distress; (3) and actual and proximate

1 causation of the emotional distress by the defendant's outrageous conduct." *Cervantez v. J.C.*
 2 *Penney Co.*, 24 Cal. 3d 579, 593 (1979).

3 Behavior may be considered outrageous if a defendant acts intentionally or
 4 unreasonably with the recognition that the acts are likely to result in mental distress. *Bartling v.*
 5 *Glendale Adventist Med. Center*, 184 Cal.App.3d 961, 965 (1986); *see also Cervantez*, 24 Cal.
 6 3d at 592 ("it is a serious matter to accuse someone of committing a crime and to arrest him
 7 without the protection of the warrant process"). Thus, a claim for intentional infliction of
 8 emotional distress claim may lie when a defendant acts "either with knowledge that plaintiff
 9 had not committed any offense or with reckless disregard of whether he had or not."
 10 *Cervantez*, 24 Cal.3d at 593-94. And, reckless disregard can be proven circumstantially by
 11 inference from the conduct of the actor. *Katsaris v. Cook*, 180 Cal.App.3d 256, 268 (1986).

12 Here, Defendant Wardak prevented Plaintiff from the entering the restaurant despite
 13 allowing two other persons to enter the restaurant moments before. (FAC ¶ 19.) Thereafter,
 14 Defendant Wardak called the police and made a false report that three or four black males were
 15 creating a disturbance in the parking lot. (FAC ¶ 20.) When the police arrived, Defendant
 16 Wardak requested the officers to arrest Plaintiff and Jerry Walker for trespassing. (FAC ¶ 21.)
 17 After Plaintiff's unlawful arrest, Defendant Wardak collaborated with the police officers
 18 involved in Plaintiff's arrest by making material misrepresentations in his citizen's arrest report
 19 and falsely accusing Plaintiff of engaging in criminal conduct. (FAC ¶¶ 26-27.)

20 Defendants' conduct was outrageous and intentional and did in fact cause Plaintiff
 21 serious emotional distress. The Court should deny Defendants' motion to dismiss Plaintiff's
 22 cause of action for intentional infliction of emotional distress.

23 **E. Defendants Violated Civil Code § 51.7.**

24 Defendants' motion to dismiss Plaintiff's Eighth Cause of Action, which alleges a
 25 violation of Civil Code section 51.7, is based on the argument that the violence against Plaintiff
 26 was perpetrated by officers of the Hayward Police Department. (Defs' P&A iso Mot. to
 27 Dismiss, at 10:14-17.) Defendants, however, gloss over the fact that the harm to Plaintiff was
 28 caused in substantial part by Defendant Wardak's false report to the police and his request to

1 the police officers to arrest Plaintiff for trespassing. (FAC ¶¶ 20, 22.)

2 Section 51.7 of the California Civil Code provides in pertinent part that all persons have
 3 a right to be free from violence or intimidation by threat of violence against their persons on
 4 account of their race or color. Further, section 52(b) of the Civil Code provides for liability
 5 under an agency theory in that persons “who aid in” or “incite a violation,” and persons who
 6 conspire to violate the statute may be held liable pursuant to section 51.7.

7 Under the plain text of section 51.7, any violence or intimidation by threat of violence
 8 would constitute a violation of the statute. *People v. MacKenzie*, 34 Cal.App.4th 1256, 1278
 9 (1995) (all violent conduct committed against others on account of their protected status is
 10 prohibited). The words “force” and “violence” are synonymous and mean any wrongful
 11 application of physical force against the property or person of another. *People v. Bravot*, 183
 12 Cal.App.3d 93, 97 (1986).³

13 Here, Defendant Wardak made a false police report claiming that three or four black
 14 males were creating a disturbance in the restaurant parking lot. (FAC ¶ 20.) When the police
 15 arrived on the scene, Defendant Wardak directed them to arrest Plaintiff and Jerry Walker for
 16 trespassing. (FAC ¶¶ 21-22.) Defendant Wardak’s conduct, which amounted to aiding in and
 17 incitement of a violation of Section 51.7, resulted in Plaintiff’s arrest and led to Plaintiff’s
 18 violent assault at the hands of the Hayward Police Department officers. Cal. Civ. Code § 52(b);
 19 FAC ¶¶ 22-25.

20 Accordingly, Plaintiff has a viable cause of action for a section 51.7 violation.

21 **F. Defendants Violated Civil Code § 52.1 by Falsely Arresting Plaintiff for Trespass.**

22 Section 52.1 of the Civil Code prohibits interference or attempted interference with a
 23 person’s rights under federal or state law by means of threats, intimidation, or coercion. A
 24 violation of section 52.1 of the Civil Code may be predicated on a violation of Section 43 of the
 25 Civil Code. *Jones* 17 Cal.4th at 338. Although section 52.1 was enacted to stem a tide of hate
 26 crimes, it is not limited to such crimes and it does not require a plaintiff to show discriminatory
 27

28 ³ “Intimidation” means to make timid or fearful. *Ex parte Bell*, 19 Cal.2d 488, 526 (1942).

1 purpose on the part of the defendant. *Venegas v. County of Los Angeles*, 32 Cal.4th 820, 842-
 2 43 (2004).

3 “Use of law enforcement authority to effectuate a stop, detention (including use of
 4 handcuffs), and search can constitute interference by threat [], intimidation or coercion [].”
 5 *Cole v. Doe 1 thru 2 Officers of the City of Emeryville Police Dept.*, 387 F. Supp. 2d 1084,
 6 1103 (N.D. Cal. 2005) (citing *Venegas*, 32 Cal.4th 820, *Jones*, 17 Cal. 4th at 334.) Thus,
 7 evidence of violence or threat of violence is not a required element in proving a section 52.1
 8 violation. *Id.* Evidence of physical ejection or arrest without the use of force is sufficient for
 9 purposes of proving the threat, intimidation or coercion element. *Id.* at 1103-04.

10 Here, Plaintiff has alleged and Defendants have conceded that Wardak made a citizen’s
 11 arrest. (FAC ¶ 27, Defs’ P&A iso Mot. to Dismiss, at 6:22-23.) However, Defendants’ arrest
 12 of Plaintiff was without lawful justification (FAC ¶¶ 20-22), and amounted to threatening,
 13 intimidating, and coercive conduct under section 52.1 of the Civil Code. *See Cole*, 387 F.
 14 Supp. at 1103-04. Moreover, Defendants’ conduct was a substantial factor in Plaintiff’s
 15 unlawful arrest and the consequent physical injuries sustained by Plaintiff.

16 Accordingly, Plaintiff has a viable cause of action for a violation section 52.1 of the
 17 Civil Code.

18 **III. CONCLUSION**

19 Based on the foregoing Points and Authorities, Plaintiff respectfully requests the Court
 20 to deny Defendants’ Motion to Dismiss.

21 Dated: May 19, 2008

Respectfully submitted,

22 /s/ Jivaka Candappa

23 Jivaka Candappa, Attorney
 24 for Plaintiff, KEVIN WALKER

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